

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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| JOSEPH M.L. GARDNER, |) | |
| |) | |
| Petitioner, |) | C.A. No. 2:05-1647-HMH-RSC |
| |) | |
| v. |) | |
| |) | |
| JON OZMINT, Commissioner, |) | OPINION & ORDER |
| South Carolina Department of Corrections, |) | |
| |) | |
| Respondents. |) | |

Petitioner, through his attorney, has moved pursuant to 28 U.S.C. § 4555 for the disqualification of the undersigned and Magistrate Judge Carr from any further participation in this matter.

The basis for Petitioner's motion is Magistrate Judge Carr's order filed February 17, 2006, which contains a verbatim email from a staff member of the undersigned to Magistrate Judge Carr's secretary. The quoted language accurately sets forth the scheduling concerns and time constraints for a final order in this matter.

In discussing the possibilities of an objection to a report and recommendation which may be filed by either party, the communication mentions that "the petitioner is likely to request an extension of time." The communication should have said "parties" instead of "petitioner." Nevertheless, Petitioner argues that the language implies a preconceived conclusion that the Petitioner will not prevail.

Because this matter has been before the Magistrate Judge, the undersigned has not reviewed the petition or the Respondents' motion for summary judgment. Furthermore, the

undersigned has not discussed the merits of this case with Magistrate Judge Carr or anyone else and has no preconceived thoughts about the merits of the case.

The undersigned is not in any way prejudiced against the Petitioner, but, out of an abundance of caution and to avoid any appearance of impropriety, the undersigned does disqualify himself pursuant to 28 U.S.C. § 455.

s/Henry M. Herlong, Jr.
United States District Judge

Greenville, South Carolina
February 22, 2006